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May 31, 1996

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Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W. - Room 222
Washington, D.C. 20554

**Re: MM Docket No. 92-266, CS Docket No. 96-60
Order on Reconsideration and Further Notice of
Proposed Rulemaking**

Dear Mr. Caton:

DOCKET FILE COPY ORIGINAL

A&E Television Networks, Courtroom Television Network, NBC Cable, and Ovation, by its attorneys and pursuant to Section 1.415 of the Commission's Rules, hereby submit an original and eight copies of their Reply Comments filed in the above-captioned proceeding. An additional copy is included to be stamped as a receipt copy.

Please contact the undersigned if you have any questions with regard to this matter.

Respectfully submitted,

HOGAN & HARTSON L.L.P.

By: Robert Corn-Revere
Robert Corn-Revere
Jacqueline P. Cleary
Jeremy B. Miller

Their Attorneys

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 Rate Regulation	)	MM Docket No. 92-266 CS Docket No. 96-60
	)	
Leased Commercial Access	)	

REPLY COMMENTS OF CABLE PROGRAMMING COALITION OF A&E TELEVISION NETWORKS, THE COURTROOM TELEVISION NETWORK, NBC CABLE AND OVATION

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May 31, 1996

SUMMARY

The Commission should abandon the proposed cost-based formula for setting the maximum reasonable rate for commercial leased access programming, and retain the highest implicit fee formula. As demonstrated conclusively by the initial comments filed by the Programmers and numerous other parties, the proposed cost/market approach is inconsistent with the promotion of diversity and other statutory, constitutional, and regulatory goals. The would-be programmers who filed comments in favor of the proposal did so on a result-oriented basis to lower their own access rates, but failed to show or provide a legitimate explanation for *why* the current pricing approach should be modified.

The highest implicit fee formula is the approach that most effectively meets Congress' goals in establishing leased access programming. Among other advantages, this method does not undermine diversity by "bumping," subsidizing, or favoring one group of programmers, and it provides the most economically pure method to correlate the maximum reasonable rate with the market determination of channel value. If the Commission does insist on lowering the maximum reasonable rate, as an alternative to the highest fee approach, it should adopt a rate averaging formula based on the average implicit fee within each tier.

Certain basic criteria must be incorporated into any rate formula ultimately adopted. The leased access statute, related FCC proceedings, and the realities of the cable marketplace dictate that protections against bumping, and an avoidance of quotas and hit lists are among minimum safeguards that must be implemented.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of	)	
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Leased Commercial Access	)	

REPLY COMMENTS OF CABLE PROGRAMMING COALITION OF A&E TELEVISION NETWORKS, THE COURTROOM TELEVISION NETWORK, NBC CABLE AND OVATION

A&E Television Networks (including the A&E Network and The History Channel); Courtroom Television Network ("Court TV"); NBC Cable (including CNBC and America's Talking) and Ovation (together, the "Programmers"), through their attorneys and pursuant to Section 1.415 of the Commission's rules, 47 C.F.R. § 1.415, hereby submit these Reply Comments in response to the comments filed on May 15, 1996 in the above-captioned proceeding.

The Programmers urge the Commission to abandon the proposed cost/market formula for the maximum reasonable rate for leased access programming, 1/ and to retain the highest implicit fee formula instead. If the

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1/ *See Order on Reconsideration of the First Report and Order and Further Notice of Proposed Rulemaking* (March 29, 1996) ("*NPRM*").

Commission insists on lowering the maximum reasonable rate, an average implicit fee as proposed by the National Cable Television Association ("NCTA") should be the model for a rate that would be consistent with the legislative, regulatory, and constitutional parameters of leased access programming. Additionally, the Commission should adopt certain safeguards proposed by the Programmers to insure that the leased access formula does not undermine statutory and constitutional goals.

I. THE COMMISSION'S PROPOSED COST-BASED FORMULA IS INCOMPATIBLE WITH STATUTORY AND CONSTITUTIONAL REQUIREMENTS

The initial comments filed in this proceeding, including empirical and economic data and analyses, demonstrated beyond a shadow of a doubt that the cost-based formula proposed in the *NPRM* is harmful, unworkable and contrary to Congress' intent in adopting leased access requirements. As the Programmers indicated in their initial comments, the proposed formula is a quota-based approach that would displace existing and emerging innovative programming services, thus thwarting Congress' goal of promoting diversity. 2/ It would do so by creating a "death row" for programmers to be dropped, which would undercut their subscribership, investment, and advertising revenues. The approach ignores subscriber preferences. For example, the comments of cable operators in this proceeding demonstrated that the proposed formula

2/ Communications Act of 1934, as amended ("Communications Act"), § 612(c)(1), 47 U.S.C. § 532(c)(1).

undervalues consumer demand for existing networks and vastly overestimates subscriber interest in more leased access programming. 3/

The proposed formula also is inconsistent with statutory and constitutional values. It would undermine other FCC policies, such as those embodied in the "going-forward" rules and social contracts, which were designed to encourage launches of quality programming services. A quota-based approach would also violate the First Amendment because it intrudes excessively on editorial discretion and is not narrowly tailored to achieve the Commission's purported aim of promoting diversity.

In addition to these deficiencies, the proposed formula does not "assure that [leased access] will not adversely affect the operation, financial condition, or market development of . . . cable system[s]," as the law requires. 4/ As the Programmers pointed out, the formula ignores market considerations, such as the value of channel space and tier placement, and it would deprive cable operators of a reasonable rate of return by improperly excluding certain opportunity costs and other costs deemed too "speculative" to quantify. 5/ Finally, it would establish an unworkable negotiating dynamic based on a bifurcated pricing mechanism that would shift the

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3/ *See, e.g.*, Comments of TCI at 8-9, 17-18 & Appendix E; Comments of Time Warner Cable at 30-31.

4/ Communications Act, § 612(c)(2), 47 U.S.C. § 532(c)(2).

5/ *NPRM* at ¶¶ 79, 86.

standard for what constitutes a reasonable rate, depending upon whether the leased access quota is filled.

Other commenters to this proceeding emphasized additional drawbacks to the *NPRM*'s cost/market approach. The proposed formula would adversely affect programmers by lowering revenues for all programmers on a tier carrying leased access channels; 6/ would artificially increase demand for leased access by shopping networks and infomercials; 7/ and would impose substantial video personnel, equipment, and billing costs upon cable operators and subscribers. 8/ The cost-based approach also would impair cable operators' Fifth Amendment rights by denying them just compensation and equal protection. 9/

In contrast, none of the comments supporting the proposal provided adequate evidence or reasoning to justify adoption of the proposed cost/market formula. Generally, such comments supported a decrease in leased access rates as an end unto itself -- a goal the Commission expressly disavowed in the *NPRM*. 10/ Despite the Commission's admonition that "[t]he purpose of the cost formula is not to

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6/ Comments of the National Cable Television Association, Inc. at 15.

7/ *See, e.g.,* Comments of Outdoor Life Network, Speedvision Network, the Golf Channel, and BET on Jazz at 22.

8/ Comments of Time Warner Cable at 19.

9/ *See, e.g.,* Comments of TCI at 39-40.

10/ *NPRM* at ¶¶ 27-28.

lower rates," and that there is no guarantee that "the maximum rate for leased access programmers will decrease," 11/, one home shopping network complained that the leased access formula must be changed in order reduce rates. 12/

Similarly, the Center for Media Education, *et al.* ("CME"), relied on self-serving, conclusory statements, such as that it "strongly believes that central to the goal of diversity of programming sources is affordable access to cable systems by non-profit programmers," and that "a uniform access structure would prevent non-profit programmers from making an invaluable contribution to national discourse." 13/ The proffered "contribution to national discourse" remains something of a mystery, however, since CME provided no examples of entities that have ever been precluded from using leased access channels, or that would take advantage of any FCC-created subsidy. Beyond its rather theoretical interest in leased access, CME asserted -- erroneously -- that the purpose of the 1992 Cable Act amendments was "to set lower rates." 14/

Low-power television stations and other entities complained of operators' non-compliance with leased access procedure requirements, and contended that the

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11/ *NPRM* at ¶ 68.

12/ Comments of ValueVision International, Inc. at 17-18.

13/ Comments of CME at 2. CME's emphasis on non-profit entities is somewhat perplexing since Section 612 focuses on *commercial* leased access.

14/ Comments of CME at 4.

current system is unresponsive to them. 15/ The bottom line of such comments, however, is that certain would-be programmers would like to pay less for access. But none of the comments demonstrated that a cost-based pricing policy would further the statutory goal of increased programming diversity. 16/

II. THE COMMISSION SHOULD RETAIN THE HIGHEST IMPLICIT FEE FORMULA

Other than their self-interested desire for lower rates, the commenters who supported the *NPRM*'s approach also failed to demonstrate that the current highest implicit fee formula has been detrimental to leased access programmers or has thwarted congressional goals. In fact, as demonstrated by the Programmers' arguments in their initial comments and the empirical and economic evidence submitted by other commenters, the highest implicit fee more effectively meets congressional objectives. The Commission noted that Section 612 of the Communications Act of 1934 17/ sought to promote competition and diversity of programming sources, as well as to enhance the growth and development of cable systems. 18/ The highest implicit

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15/ *See, e.g.,* Comments of Erwin Scala Broadcasting; Comments of United Broadcasting Corporation, d/b/a/ TELEMIAMI.

16/ The implication of ValueVision's comments is that its home shopping service should be preferred over such channels as Court TV and Headline News. ValueVision Comments at 7. Such an assertion may serve ValueVision's private interest, but it does nothing to further the public interest in greater diversity.

17/ 47 U.S.C. § 532.

18/ *NPRM* at ¶ 25.

fee best achieves these goals by utilizing as the *maximum* reasonable rate the most economically pure measure of the *maximum* price -- the market determination of the highest per-channel value. Significantly, the highest implicit fee formula is most consistent with the statutory purpose underlying leased access programming, where the maximum reasonable rate was designed as a safety valve to prevent abuse of market power and to serve as the starting point for the cable operator's negotiation with a leased access programmer.

The Commission's reasons for elimination of the highest implicit fee formula are misguided. The FCC's assumption that "the highest implicit fee allows double recovery of subscriber revenues by the operator," 19/ misinterprets the relationship between cable programmers, subscribers and quality programming. Cable carriage and tier placement have market values that belie simplistic assertions that leased access programmers have paid "too much" for a choice spot on a cable system. 20/ By the same token, subscriber preferences should be reflected in the "reasonableness" of leased access fees. As noted earlier, comments filed in this

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19/ *NPRM* at ¶ 8.

20/ *See, e.g.*, Paul Kagan Assoc., Inc., CABLE TV PROGRAMMING (May 20, 1996) at 1 ("the high-stakes poker game of cable network start-ups [has] set a new price on the value of basic carriage").

proceeding demonstrated that subscribers place a high value on commercial cable networks 21/ and relatively little or no value on leased access programming. 22/

The Commission's other concerns, that the highest implicit fee formula "is not based on the reasonable costs" of leased access programming and inappropriately "rewards operators who do not meet the set-aside requirement," 23/ result from a mistaken view of the statutory requirements. Nothing in the law suggests that reasonable rates should be cost-based, and the Commission has properly rejected such proposals in the past. 24/ Additionally, the Cable Act does not require the Commission to establish a formula designed to ensure the channel set-asides will be filled -- much less that it cause the sacrifice of non-leased access networks.

The highest implicit fee approach avoids the problems raised by the cost/market formula proposed by the Commission, as identified above. It does not promote "bumping," subsidizing, or otherwise favoring one group of programmers over another; it more accurately reflects the market realities of carriage negotiation, as opposed to an intrusive quota system; and it does not limit the amount of "opportunity

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21/ Comments of TCI at 17-18.

22/ Comments of Time Warner Cable at 30-31.

23/ *NPRM* at ¶ 30.

24/ *Report and Order and Further Notice of Proposed Rulemaking,* 8 FCC Rcd 5631 at ¶ 513 (1993). The Commission was rightly concerned "that substantial migration will occur under [a cost-based] approach, with uncertain and possibly harmful effects on the structure of the industry." *Id* costs" that may be recovered to permit cable operators a reasonable return. 25/ Perhaps most importantly, retention of this approach would obviate the numerous anti-competitive effects of a "hit list" and the constitutional defects of the proposed leased access quota.

III. AS AN ALTERNATIVE TO THE HIGHEST IMPLICIT FEE, THE COMMISSION SHOULD SET THE MAXIMUM REASONABLE RATE BY RATE AVERAGING WITHIN TIERS

For the reasons already stated, the Programmers believe that the Commission should retain the existing formula. However, of the alternatives presented by other commenters in this proceeding, the average implicit fee formula advocated by NCTA -- along with appropriate safeguards described below -- comes closest to fulfilling the public interest goals of leased access. Thus, if the Commission insists on changing the maximum reasonable rate, it should adopt a formula based on an average of the implicit fees.

A modified form of the "Average Channel Rate Plus Markup" approach endorsed by the NCTA 26/ would provide a suitable formula to calculate such an average. Under the NCTA's suggested method, an operator would subtract the total programming cost for the basic and CPS tiers from the subscriber revenue for those tiers, divide by the total number of basic and CPS channels, and multiply this amount

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25/ *See NPRM* at ¶¶ 80-83.

26/ Comments of NCTA at 21-24.

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by a mark-up. While averaging across tiers in this way simplifies the rate calculation, it incorporates one of the drawbacks of the Commission's cost-based method -- failure to take into account the value of tier placement. Accordingly, to improve the correlation between the value of the channel assigned to a leased access programmer and the rate for that channel, the Programmers propose modifying this formula to average rates within each tier. In regard to NCTA's suggested margin, the Programmers agree with this aspect of its proposal. A mark-up of 11.25 percent would provide a fair rate of return to the operators, and be consistent with the mark-up on equipment costs permitted by the Commission.

The NCTA proposal incorporates several of the policy criteria described by the Programmers in their initial comments, and is far superior to the FCC's proposed formula. Similar to the highest implicit fee approach, the NCTA plan does not impose a quota, and will not require operators to generate hit lists of endangered programming services. It more accurately reflects market conditions than does a cost-based approach, and does not limit artificially the amount of "opportunity costs" that cable operators may recover. Thus, if the Commission concludes that it must change the leased access rate formula, the NCTA proposal provides the basis for an acceptable alternative.

IV. AT A MINIMUM, THE RATE FORMULA ADOPTED SHOULD INCLUDE SAFEGUARDS THAT FURTHER THE DIVERSITY GOALS OF THE LEASED ACCESS STATUTE AND OTHER FCC PROCEEDINGS, AND SHOULD REFLECT THE REALITIES OF THE CABLE MARKETPLACE

Whatever formula the Commission ultimately adopts, it should include appropriate safeguards to prevent the loss of diverse programming services. As noted above, neither the highest implicit fee formula, nor the NCTA proposal, impose a quota on the usage of leased access channels. Nor do they require cable operators to create hit lists of programming networks that will be sacrificed. Any solution the Commission adopts must similarly avoid these policy pitfalls. In addition, as explained more fully in the Programmers' initial comments, any new leased access rules should support the statutory goal of promoting programming diversity in the manner that Congress intended -- without economic damage to the cable industry in general and the market for programming services in particular.

Consequently, any new formula should not require existing services to be bumped, and should only require the addition of leased access channels as sufficient capacity becomes available so as to avoid thwarting new network launches. Part time leased access programmers should not be permitted to displace full time programming services, due to the disruptive effect this would have on channel line-ups and subscribers. Additionally, any solution should reflect market realities and avoid the uncertainty created by bifurcated approaches such as the *NPRM*'s cost-based/market-based formula.

Conclusion

In establishing leased access requirements as part of the 1984 Cable Act and modifying them in the 1992 Cable Act, Congress stated that its purpose was "to promote competition in the delivery of diverse sources of video programming and to assure that the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with growth and development of cable systems." 27/ The legislative history of the 1984 Cable Act states that "[t]he goal of the First Amendment is to foster 'the widest possible dissemination of information from diverse and antagonistic sources.'" 28/ Any attempt to establish a "reasonable rate" for commercial leased access should incorporate these goals in order to satisfy the public interest. Clearly, the cost/market-based approach fails this test. The highest implicit fee formula, or the alternative averaging approach suggested by the NCTA (with

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27/ Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984), Cable Television Consumer Protection and Competition Act of 1992, Pub.L. No. 102-385, 106 Stat. 1460 (1992), 47 U.S.C. § 532(a).

28/ Committee on Energy and Commerce, Cable Franchise Policy and Communications Act of 194, H.R. Rep. No. 934, 98th Cong., 2d. Sess. (1984) (citing *Associated Press v. United States*, 326 U.S. 1, 20 (1945)).

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appropriate safeguards), is far more likely to be consistent with these statutory and constitutional objectives.

Respectfully submitted,

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Dated: May 31, 1996